IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1307

JOHNNIE MARIE SUMPTER,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Indiana

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To the Supreme Court of Indiana

The petitioner Johnnie Marie Sumpter respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Indiana entered in this proceeding on January 28, 1976.

OPINION BELOW

The opinion of the Supreme Court of Indiana, not yet reported, appears in Appendix A hereto. No petition for rehearing was filed. A prior opinion of the Indiana Court of Appeals, reported in 296 N.E.2d 131, appears in Appendix B

hereto. A prior opinion of the Supreme Court of Indiana, reported in 306 N.E.2d 95, appears in Appendix D hereto. After the prior opinion of that Court, petitioner took an appeal to this Court, which was dismissed, — U.S. —, 95 S.Ct. 25, 42 L.Ed.2d 38 (1974), Appendix F.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on January 28, 1976. No rehearing was sought. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Is a defendant in a criminal case entitled to trial by jury?

2. Is the double jeopardy standard violated by granting the state another chance to prove a factual element it failed to prove in a first trial?

3. Can a greater punishment be imposed for a lesser offense?

4. Can a greater punishment be imposed upon women, than men, for essentially the same offense?

5. In a criminal case, can the burden of proof ever be *constitutionally* shifted to the defendant?

6. Does a retrospective application of a new criminal procedure, to a defendant's detriment, offend the *ex post facto* principle?

STATUTORY PROVISIONS INVOLVED

The Acts of the Indiana General Assembly of 1965, Chapter 345, § 1, p. 1025, as amended by the Acts of 1967, Chapter 23, § 1, p. 28, codified as IC 1971, 35-30-1-1 (Ind. Ann. Stat. § 10-4220), read as follows:

> "Prostitute.—Any female who frequents or lives in a house or houses of ill fame, knowing the same to be a house of ill fame or who commits or offers to commit one (1) or more acts of sexual intercourse or sodomy for hire, shall be deemed guilty of prostitution, and on conviction thereof shall either be fined not less than one hundred ($100.00) nor more than five hundred dollars ($500.00); and imprisonment not to exceed 180 days or such person may be imprisoned in the Indiana women's prison not less than two (2) years nor more than five (5) years."

This Act has since been amended to substitute the word "person" for the word "female," the second word in the first line. Acts of the Indiana General Assembly of 1965, Chapter 345, § 1, p. 1025, as amended by the Acts of 1967, Chapter 23, § 1, p. 28; and amended by the Acts of 1975, P.L. 325, § 8, p. 1772; IC 1971, 35-30-1-1 (Ind. Ann. Stat. § 10-4220).

At the time in question, the Acts of the Indiana General Assembly of 1905, Chapter 169, § 470, p. 584, codified as IC 1971, 35-1-87-2 (Ind. Ann. Stat. § 10-4219), read as follows:

> "House of Ill-Fame—Visiting—Associating with prostitutes—Visiting gambling-house.—Whoever, being a male person, frequents a house or houses of ill-fame or assignation, except as a physician to treat a patient or patients,

or associates with women known or reputed as prostitutes, or frequents or visits a gambling-house or houses, or is engaged in or about a house of prostitution, shall, on conviction, be fined not less than ten dollars ($10.00) nor more than one hundred dollars ($100.00), and shall be imprisoned in the county jail not less than ten (10) days nor more than sixty (60) days."

This has also been amended by the Acts of the Indiana General Assembly of 1975, P.L. 325, § 4, p. 1772; IC 1971, 35-1-87-2 (Ind. Ann. Stat. § 10-4219), to delete the words "being a male person" appearing after the word "Whoever," the first word in the body of the section.

Also involved is IC 1971, 35-1-83-2 (Ind. Ann. Stat. § 10-4217), which reads:

"*Houses of ill fame—Keeping.*—Whoever keeps a house of ill fame, resorted to for the purpose of prostitution or lewdness, or knowingly lets a house to be so kept, or knowingly permits a house which he has let to be so kept, shall be fined not less than ten dollars [$10.00] nor more than one hundred dollars [$100], to which may be added imprisonment in the county jail not exceeding six [6] months. [Acts 1905, ch. 169, § 460, p. 584.]"

CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the Constitution of the United States are involved:

Article 1, § 10 [1]: "no state shall * * * pass any * * * ex post facto law * * *"

Fifth Amendment: "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *"

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury * * *."

Eighth Amendment: "* * * nor cruel and unusual punishments inflicted."

Fourteenth Amendment: "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On September 30, 1971, the respondent filed an affidavit charging, in Count I thereof, that petitioner knowingly *lived* in a house of ill fame. Count II of the affidavit charged petitioner with knowingly *frequenting* a house of ill fame. Thereafter petitioner filed a "Motion to Quash", then the method of challenging the affidavit in Indiana, which raised Federal Constitutional questions: the act under which petitioner was charged punished for a status, was impermissibly vague, and only applied to women, thus violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. This motion was overruled by the trial court.

Petitioner then pleaded not guilty. Before commencement of the trial, petitioner filed a "Special Plea", again raising a Federal Constitutional question: The act under which petitioner was charged only applied to women, and thus offended the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. This plea was overruled and denied by the trial court.

Trial was commenced to a jury. The evidence generally showed that for about two years prior to July 14, 1971, two

young men had gone to a certain house in Evansville, Indiana. The petitioner admitted them on about the twenty occasions they went there during this period of time; they went to a living room; picked out a girl; signed a card, paid the girl; had sexual intercourse and fellatio; and the petitioner let them out, saying "goodnight boys." Petitioner never committed any acts of sexual intercourse or fellatio with them and never took any money from them. The utilities for this house were registered in petitioner's name, and during part of the time in question petitioner owned it. This house had the reputation for being a house of ill fame. Some of petitioner's personal things were found in the house and petitioner told a vice squad police officer that one of the rooms was petitioner's.

The jury found petitioner guilty of Count I, living in a house of ill fame, and not guilty of Count II, frequenting a house of ill fame. Petitioner was sentenced to the Indiana Women's Prison for an indeterminate term of from two (2) to five (5) years. A "Motion to Correct Errors" was filed which assigned, *inter alia*, the above-mentioned Federal Constitutional grounds.

The trial court overruled petitioner's motion to correct errors, and an appeal was taken to the Indiana Court of Appeals. That court reversed the conviction in an opinion and judgment entered on the 21st day of May, 1973. (296 N.E.2d 131, Appendix B) The respondent filed a petition for rehearing with that court, which it denied on the 18th day of June, 1973. (Appendix C hereto) The respondent then petitioned the Supreme Court of Indiana to transfer the case to it for review. That court granted the petition and decided the issues adversely to petitioner but ordered a remand, with an opinion and judgment entered on January 22, 1974. (306 N.E.2d 95, Appendix D hereto) Petitioner filed a petition for rehearing with the Indiana Supreme Court on the 11th day of February, 1974, which petition was dismissed on April 25, 1974. (Appendix E hereto) Petitioner took an appeal to the Supreme

Court of the United States, which dismissed the appeal for want of jurisdiction on October 15, 1974. (... U.S. ..., 95 S.Ct. 25, 42 L.Ed.2d 38 (1974), Appendix F hereto)

In the meantime, pursuant to the remand order of the Supreme Court of Indiana, on June 19, 1974, the cause again came on for trial before the Vanderburgh Circuit Court. Prior to the trial, petitioner filed "Defendant's Objections to Being Placed on Trial", the relevant parts of which read:

> "Defendant objects to being placed on trial for the following reasons:
>
> 1. The Defendant is being deprived of the right to trial by jury as guaranteed by * * * the Sixth Amendment to the United States Constitution.
>
> 2. Defendant has had the burden of proof shifted to said Defendant upon the 'most fundamental element' of the offense with which Defendant is charged, in contravention to the Due Process Clause of the Fourteenth Amendment to the United States Constitution, * * *.
>
> 3. The shifting of the burden of proof, or of 'going forward with the evidence' in charges brought under the statute which Defendant allegedly violated, and not under other statutes is a denial of the Defendant's rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, * * *.
>
> 4. By having this Court observe and judicially notice Defendant's sex, Defendant is forced to give evidence against Defendant's self in violation of * * * the Fifth Amendment to the United States Constitution.
>
> 5. The State failed to maintain its burden of proof in the first trial of Defendant, and the State now has another chance to try Defendant, placing Defendant in jeopardy twice for the same offense in violation of * * * the Fifth Amendment to the United States Constitution.

6. The Defendant is being subjected to a new procedure for establishing sex in a criminal trial, as the result of the opinion and judgment of the Indiana Supreme Court. This action by the Supreme Court was erroneous for the following reasons, to-wit:

* * *

(b) If such action be construed as promulgation of a new Rule, it was not promulgated in accordance with the Supreme Court's pre-existing procedures; was without notice and therefore violative of * * * the Fourteenth Amendment to the Federal Constitution.

(c) The retrospective application of this new procedure violates constitutional guarantees and vested rights of the Defendant, namely the right to have the State's case proven beyond a reasonable doubt, and the right to confront witnesses, as guaranteed by * * * the Sixth Amendment to the Constitution of the United States.

(d) The retrospective application of this new procedure against the Defendant is in the nature of an *ex post facto* law, as prohibited by * * * Article 1, §9 (3) of the United States Constitution."

These objections were overruled.

Trial commenced to the court, who observed petitioner and judicially noted that petitioner was a female person Petitioner introduced into evidence portions of a medical treatise "describing various genetic and pathological conditions which make it difficult (if not impossible) to determine an affected individual's sex by external physical observation." (Opinion of Indiana Supreme Court) The trial court entered the same judgment and sentence originally imposed upon petitioner.

Petitioner then filed a "Motion to Modify Judgment," raising Federal questions, the relevant parts of which read:

"Defendant respectfully moves the Court to modify the judgment, or sentence, heretofore imposed upon defendant, and in support of said motion would show to the Court as follows:

1. Defendant was convicted of the offense of living in a house of ill fame, I.C. 1971, 35-30-1-1 (Ind. Ann. Stat. § 10-4220) and sentenced to a term of two (2) to five (5) years imprisonment.

2. The offense for which defendant was convicted is logically, and of necessity, a lesser included offense in a charge brought under I.C. 1971, 35-1-83-2 (Ind. Ann. Stat. § 10-4217), "Keeping a house of ill-fame" for which the penalty cannot exceed imprisonment for six (6) months.

3. That to impose a greater penalty for a lesser included offense violates the Eighth Amendment to the United States Constitution * * *.

4. That the statute regulating male persons, the companion statute to the one under which Defendant was convicted, I.C. 1971, 35-1-87-2 (Ind. Ann. Stat. § 10-4219) only provides for imprisonment of from ten (10) to sixty (60) days.

5. That to provide such glaring disparity of treatment between males and females violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution * * *.

Wherefore, Defendant prays that the judgment of this Court be modified to provide for imprisonment of no more than six (6) months, or in the alternative, no more than sixty (60) days."

This motion was overruled by the court on the same day.

Petitioner then filed a "Motion to Correct Errors" which assigned as errors, the overruling of all previous motions, adopting by reference the grounds asserted in support of these motions.

This motion to correct errors was overruled, and petitioner prosecuted on appeal to the Court of Appeals of Indiana. That court transferred the case by written order, to the Supreme Court of Indiana (unreported order, appendix G hereto).

The Supreme Court of Indiana affirmed petitioner's conviction (Appendix A hereto).

REASONS FOR GRANTING THE WRIT

The Indiana State Court Has Rendered Federal Questions of Substance Not in Accord With the Applicable Decisions of This Court.

1. **Is a defendant in a criminal case entitled to trial by jury?**

The Sixth Amendment to the Constitution of the United States seems to have unequivocally answered that question. It, along with the first ten amendments, has been held to be applicable to the States through the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. It has been held that, "This right of trial by jury ranks very high in our catalogue of constitutional safeguards." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17, 76 S.Ct. 1, 100 L.Ed. 8 (1955). The peculiar procedure utilized in the case below, as revealed by the opinion of the Indiana Supreme Court, has not been utilized in any prior case, insofar as petitioner can determine. There was no jury at the petitioner's second trial. In a well reasoned court of appeals decision from the Third Circuit, the court held it be be a denial of Sixth Amendment rights where the trial judge, in a charge to the jury, withdrew from the jury one essential element of the crime charged. *Cassella v. United States*, 449 F.2d 277, 283 (3 Cir. 1971). In the instant case, the element of a defendant's sex, was characterized by the Indiana Supreme Court in its prior opinion as "the most fundamental element" of the crime charged. (Appendix D) On the remand of the case by that court, the matter was tried, over petitioner's objections without a jury.

2. **Is the double jeopardy standard violated by granting the state another chance to prove a factual element it failed to prove in a first trial?**

In the opinion of the Indiana Supreme Court it conceded that, "There is no doubt that the proceedings on remand were 'devoted to the resolution of factual issues going to the elements of the offense charged,' and therefore at odds with the constitional policy against multiple trials." This constitutional policy derives from the Fifth Amendment to the Constitution of the United States. Supporting petitioner's position is *United States v. Jenkins*, — U.S. —, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975), cited by the Indiana Supreme Court in its opinion. That court went on to say that, "When a defendant who has been adjudged guilty wins reversal of an unsatisfied conviction, the Double Jeopardy Clause does not bar his retrial," citing a number of decisions of this Court. These citations are inappropriate as the petitioner did not win a reversal of the conviction—the effect of the first opinion of the Indiana Supreme Court was to give the State another opportunity to prove a *factual* element of the crime charged which it failed to prove at the first trial. The Indiana Supreme Court's reliance on *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1970), is misplaced as that case dealt with an initial mistrial, which the plurality of this Court found to be the product of inadequate examination vís a vís the "manifest necessity" principle.

3. **Can a greater punishment be imposed for a lesser offense?**

Such greater punishment is forbidden by the Constitution of the United States, Eighth Amendment. It will be noted that the Indiana statute more severely punishes *living* in a house of ill fame (I.C. 1971, 35-30-1-1 [Ind. Ann. Stat. § 10-4220]) than *keeping* a house of ill fame (I.C. 1971, 35-1-83-2 [Ind. Ann. Stat. § 10-4217]). A school child can perceive the

grosser misconduct proscribed by the latter statute. Such disparity is prohibited by *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910). The Indiana Supreme Court's opinion upon this issue turns upon its technical view of "lesser included offenses", an analysis not sufficient to resist the constitutional pressures generated by this Court's opinion in *Weems*.

4. **Can a greater punishment be imposed upon women, than men, for essentially the same offense?**

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution dictates that it cannot. It will be observed that the Indiana statutes effective at the relevant time (I. C. 1971, 35-30-1-1 [Ind. Ann. Stat. § 10-4220] and I. C. 1971, 35-1-87-2 [Ind. Ann. Stat. § 10-4219]) punished women over thirty times as harshly as men. Although the reader will note minor differences in the Acts, Justice De Bruler of the Indiana Supreme Court, dissenting in the prior opinion of that court (Appendix D) characterizes the one punishing males as a "companion statute". Invidious discrimination against women has been held violative of the Federal Equal Protection Clause. *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Lamb v. Brown*, 456 F.2d 18 (10th Cir. 1972); *United States ex rel. Robinson v. York*, 281 F.Supp. 8 (D. Conn. 1968); *Seidenberg v. McSorley's Old Ale House, Inc.*, 317 F.Supp. 593 (D.C.S.D.N.Y. 1970); *Morgan v. State*, 179 Ind. 300, 101 N.E. 6 (1913); and *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968).

5. **In a criminal case, can the burden of proof ever be constitutionally shifted to the defendant?**

The Supreme Court of Indiana wrote of the proceedings below:

"* * * The hearing commenced with the trial court taking judicial notice that appellant was a female person. Appellant rejoined by offering into evidence selected portions of medical treatise describing various genetic and pathological conditions which make it difficult (if not impossible) to determine an affected individual's sex by physical observation. Finding this evidence insufficient to rebut the presumption, the trial court entered judgment. * * *"

Whether the Due Process Clause prohibits the burden of proof from ever shifting in a criminal case seems to be a question not decided by this Court. *Johnson v. Bennett*, 393 U.S. 253, 89 S.Ct. 436, 21 L.Ed. 2d 415 (1968). However, this Court's reference in that case to the case of *Stump v. Bennett*, 398 F.2d 111 (8 Cir. 1968), is highly significant. *Stump* holds:

"That an oppressive shifting of the burden of proof to a criminal defendant violates due process * * *."

6. **Does a retrospective application of a new criminal procedure, to a defendant's detriment, offend the *ex post facto* principle?**

The United States Constitution, Article 1, § 10 [1] prohibits states from passing *ex post facto* laws.

(Petitioner concedes the wrong constitutional provision was cited below, but argues that the question was substantially presented.)

In the case at bar the method of proving a defendant's sex where that sex was held to be the most fundamental element of the crime charged, was charged which change was retroactively applied to petitioner. A decision of this Court, *Ex Parte Medley*, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed 835 (1890), holds that

an *ex post facto* law is one which, "alters the situation of the accused to his disadvantage;". See also: *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1897).

Petitioner acknowledges that the Indiana Supreme Court's opinion formulating a new procedure was not a formal legislative enactment but the effect was just as devastating to petitioner. Petitioner contended below that the Indiana Supreme Court's action in defining a new procedure was, in fact, legislation, an assertion rejected by that court. Viewed objectively, that court's action had either to be promulgation of a new rule (which assertion was also rejected) or, in fact, judicial legislation. In any event, that complained of action was formidable enough to run afoul of the constitutional inhibition.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Indiana Supreme Court.

Respectfully submitted

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(Date) March 1, 1976

APPENDIX

APPENDIX A

Opinion and Judgment of the Indiana Supreme Court

(Filed January 28, 1976, Billie R. McCullough, Clerk of the Indiana Supreme Court and Court of Appeals)

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In the Supreme Court of Indiana

Johnnie Marie Sumpter,
Appellant (Defendant below),

v.

State of Indiana,
Appellee (Plaintiff below).

No. 575 S 130
(Court of Appeals
No. 1-1074 A 146)

Appeal From the Vanderburgh Circuit Court
The Honorable William H. Miller, Judge

Hunter, J.

Appellant was convicted after jury trial of living in a house of ill fame.[1] On appeal, this conviction was reversed because the record contained ". . . no direct evidence of appellant's sex . . ." *Sumpter v. State* (1973), ... Ind. App. ..., 296 N.E. 2d 131, 133. We accepted the state's petition to transfer the matter to this Court and modified the Indiana common law rule on proof of sex to provide that trial courts may take judicial notice of a defendant's sex. *Sumpter v. State* (1974), ... Ind. ..., 306 N.E. 2d 95. The effect of such notice is the creation of a rebuttable presumption sufficient to establish a prima facie case where the defendant "fails to produce any competent evidence to the contrary." *Id.*, at 99. Upon review of the other questions presented by appellant, we affirmed the conviction but remanded the cause to the trial court "for determination of the defendant's sex pursuant to the procedures set out herein." *Id.*, at 104.

On remand appellant objected to being retried upon the issue of sex, contending that the procedure announced in our opinion ran afoul of various state and federal constitutional provisions. The motion was overruled and a hearing was held before the trial court. The hearing commenced with the trial court taking judicial notice that appellant was a female person. Appellant rejoined by offering into evidence selected portions of a medical treatise describing various genetic and pathological conditions which make it difficult (if not impossible) to determine an affected individual's sex by external physical observation. Finding this evidence insufficient to rebut the presumption, the trial court entered judgment. Thereafter, appellant filed a motion to modify the judgment, which was overruled. Appellant filed a motion to correct errors assigning as error the overruling of all prior motions. From the overruling of the

[1] IC 1971, 35-30-1-1, IND. ANN. STAT. § 10-4220 (Burns 1956).

motion to correct errors appellant appealed to the Court of Appeals. Since the appeal arises from our remand, the Court of Appeals transferred the case directly to us.

I

We first address appellant's claim that the effect of the remand was to place appellant twice in jeopardy in violation of federal and state constitutional guarantees. There is no doubt that the proceedings on remand were "devoted to the resolution of factual issues going to the elements of the offense charged," and therefore at odds with the constitutional policy against multiple trials. See *e.g.*, *United States v. Jenkins* (1975), ... U.S. ..., 95 S. Ct. 1006, 43 L. Ed. 2d 250.

The contour of the federal double jeopardy provision is not so symmetrical as to exclude all conflicts, however. While exceptions to the ban on repeated attempts to convict "have been only grudgingly allowed," see *United States v. Wilson* (1975), — U.S. —, 95 S. Ct. 1013, 43 L. Ed. 2d 232, some do obtain. When a defendant who has been adjudged guilty wins reversal of an unsatisfied conviction, the Double Jeopardy Clause does not bar his retrial.[2] *United States v. Ball*

[2] The seminal decision is United States v. Ball. In Ball, reversal was necessitated by a defective indictment, not insufficient evidence. In Bryan v. United States, the United States Supreme Court affirmed the decision of the Fifth Circuit Court of Appeals remanding the case to the district court for new trial because there was insufficient evidence to sustain the conviction. As authority for the proposition that the remand was constitutionally inoffensive where the determination of insufficient evidence was first made by an appellate tribunal, the Bryan court relied upon Ball-type cases where the errors were "errors of law." While the illogic of a provision which bars reprosecution when a jury or trial court finds insufficient evidence and orders acquittal, but does not bar reprosecution where the same finding is made by an appellate tribunal has been pointed out, see Note, "Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence," 31 U. CHI. L. REV. 365 (1963), nevertheless, the Supreme Court has apparently rejected any distinction between insuf-

(1896), 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300; *Bryan v. United States* (1950), 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335; *United States v. Tateo* (1964), 377 U.S. 463, 84 S. Ct. 1587, 12 L. Ed. 2d 448; *United States v. Ewell* (1966), 383 U.S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627; *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656; *Chaffin v. Stynchcombe* (1973), 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714.

The rationalization of this exception has traveled under the labels of "consent," "waiver," and "continuing jeopardy." These verbalizations have recently been criticized by the United States Supreme Court. See *e.g., Breed v. Jones* (1975), — U.S. —, 95 S. Ct. 1779, 44 L. Ed. 2d 346, 358; *United States v. Wilson, supra,* n. 11; *North Carolina v. Pearce, supra,* n. 18. The necessity for such an exception continues, however, and its explanation currently lies "in an analysis of the respective interests involved," see *Breed v. Jones, supra.* Those interests are brought sharply into focus by comparing Mr. Justice Brennan's statement in his concurring opinion in *Ashe v. Swenson* (1970), 397 U.S. 436, 459, 90 S. Ct. 1189, 25 L. Ed. 2d 469, 484, "One must experience a sense of uneasiness with any double jeopardy standard that would allow the state this

ficiency of the evidence and other errors of law, see United States v. Tateo. Some members of the Court would limit a Bryan type remand to the situation where the appellant has asked for a new trial, see, e.g., Sapir v. United States (1955), 348 U.S. 373, 75 S. Ct. 422, 99 L. Ed. 426 (Douglas, J., concurring); Forman v. United States (1959), 361 U.S. 416, 80 S. Ct. 481, 4 L. Ed. 2d 412; but see concurring opinion on Harlan, J., in *Forman,* ". . . [T]he right of an appellate court to order a new trial does not turn on the relief requested by the defendant, and the Sapir Case does not suggest such a distinction," 361 U.S. 428, 80 S. Ct. 488, 4 L. Ed. 2d 421. In this case, appellant sought a new trial. Even when an appellant seeks a new trial, the evidence may be "so clearly insufficient" that an acquittal should be ordered, see Yates v. United States (1957), 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356. Such was not the case at bar, with Givan, J., and Prentice, J., voting to affirm on the basis of the record without remand.

second chance to plug up the holes in its case," with Mr. Justice Harlan's statement in *United States v. Jorn* (1970), 400 U.S. 470, 483-84, 91 S. Ct. 547, 556, 27 L. Ed. 2d 543, 556, "Certainly it is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense."

Neither federal nor state double jeopardy provisions barred the remand of appellant's cause.

II

Before the hearing on remand, appellant objected to being tried, asserting that a hearing before the bench alone would violate appellant's constitutional right to trial by jury. The wording of the objection and the trial court's action in overruling the motion suggest that the parties and the court approached the question of appellant's right to a jury trial firmly convinced that our mandate denied such right. It did not. We believe the parties reached this erroneous conclusion from an inadequate understanding of the function of judicial notice in the case at bar. To the extent that our opinion failed to elucidate the relevant considerations for the parties' guidance in this matter, we confess error. Because the presumption was not rebutted, however, there was no need for jury trial on the issue of appellant's sex.

Judicial notice of adjudicative facts[3] was initially permitted only in situations where "the fact is so commonly known

[3] "Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case."

K. Davis, ADMINISTRATIVE LAW TEXT, § 7.03 (3rd ed. 1972).

in the community as to make it unprofitable to require proof, and so certainly known as to make it indisputable among reasonable men." McCormick, McCORMICK ON EVIDENCE § 329 (2d ed. 1972). When so applied, judicial notice operates as a matter of law, whether the case be tried with or without a jury. There can be no issue of fact where the noticed matter is unquestionably true. See Comment, "The Presently Expanding Concept of Judicial Notice," 13 VILL. L. REV. 528, 542-43 (1968). Moreover, since the right to trial by jury extends only to debatable issues of fact, there can be no conflict with that right.

With an eye upon judicial efficiency, Professors Wigmore and Thayer urged that judicial notice ought to encompass facts which were *unlikely to be challenged*, as well as those which were indisputable [emphasis added]. See Davis, "A System of Judicial Notice Based on Fairness and Convenience," in PERSPECTIVE OF LAW 81 (1964). The lead case espousing this view of judicial notice is *Fringer v. Venema* (1965), 26 Wis. 2d 366, 132 N.W. 2d 565, wherein the Supreme Court of Wisconsin held that judicial notice was appropriate not only where the fact was common knowledge, but also where the fact could be verified "to a certainty by reference to competent authoritative sources." 132 N.W. 2d 26, 569. In accordance with the holding in *Fringer* is Rule 201(b) of the FEDERAL RULES OF EVIDENCE which provides:

> "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Applying this broader standard of judicial notice, the *Fringer* court judicially noticed that a bull old enough to breed fifteen heifers in a period from May to September was at least six months old at the time of the breeding, the age required to impose strict liability upon the owners of trespassing cattle under the Wisconsin statute.

Under this broader doctrine of judicial notice, a fact which is true *ordinarily*, but not *universally*, may be noticed. If the party against whom the fact is noticed is not permitted an opportunity to demonstrate that the fact is not true in the case at bar, a denial of due process results. The court in *Fringer* solved this dilemma by the application of a rebuttable presumption to the judicially noticed fact:

> "We think it appropriate to apply a rebuttable presumption that the bull was six months old where the plaintiff or claimant has established that the defendant owned the bull, allowed him to run at large, and that the bull escaped his enclosure and did damage to the property or person of another.
>
> "The application of a rebuttable presumption does not impose an unfair burden upon the owner or keeper of the bull. He is in a much superior position to know the actual age of the animal. The rebuttable presumption only requires him to come forward with some evidence as to its age and if he does, the presumption drops out and the claimant has the burden to prove the bull was six months old or older before he can recover his damage."

132 N.W. 2d 570.

A similar procedure was adopted by this Court in our opinion on transfer. We stated:

> ". . . In order to conserve precious judicial time, a rebuttable presumption of the defendant's sex arises once the judge takes judicial notice of such fact. This presumption is sufficient to constitute a *prima facie* case in favor of the State *when the defendant fails to produce any competent evidence to the contrary*. However, once the defendant

challenges the presumption by introducing competent evidence, the presumption passes forever from the case. The State, then by affirmative evidence, must establish the defendant's sex beyond a reasonable doubt."

306 N.E. 2d 99 [emphasis added].

Given the effect of a rebuttable presumption, it is clear that a defendant becomes entitled to have the jury determine the fact which has been judicially noticed whenever the defendant presents *any* "competent or admissible evidence, direct or circumstantial" which "dispute[s] the presumption." See *Young v. State* (1972), 258 Ind. 246, 280 N.E. 2d 595. In this case, our original opinion noted that judicial notice of sex would be appropriate because:

> "The sex of a human being is generally its most obvious characteristic. We can look at another human being and, with a very high degree of certainty, ascertain his or her sex."

On remand, appellant introduced the circumstantial evidence described above, but such evidence was merely a broadside at the underlying basis upon which the trial court took judicial notice of appellant's sex. There was no showing that appellant was afflicted with any of the conditions described in the medical text. Hence, the evidence introduced by appellant failed to dispute the presumption. The trial court was correct in finding such evidence insufficient to rebut the presumption. There being no disputed question of fact as to the appellant's sex, there was no need for a jury trial.

III

Appellant urges that the new procedure for establishing sex in a criminal trial was in violation of the separation of power provisions of the Indiana Constitution. Alternatively, appellant

argues that we failed to follow the procedure set forth in TR. 80 for the promulgation of "additions, modifications and changes of rules of procedure."

We deem these arguments to be without merit. To the extent the legislature has been concerned with judicial notice, it has been concerned with judicial notice of laws, not facts. See *e.g.*, IC 1971, 34-3-2-1 *et seq.* (Uniform Judicial Notice of Foreign Law Act). The only trial rule relating to judicial notice, TR. 9.1 (E), provides that "Neither presumption of law nor matters of which judicial notice may be taken need be stated in a pleading."

The law concerning proof of facts is not a matter which the constitution placed solely within the province of the legislative branch. In modifying the common law rule on proof of sex, we acknowledge that a new procedure was established, but reject appellant's thesis that any rule so announced by the Court must either be a duly adopted rule of trial procedure or a law passed by the legislature. Such an analysis sidesteps the great niche reserved for additions to the common law.

IV

Appellant further attacks the procedure as violating appellant's right to have the state prove its case beyond a reasonable doubt, the right to confront witnesses and the right to be free from ex post facto laws.

For the reasons stated in our opinion and *Young v. State* cited therein, a presumption does not alter the burden of proof and the quantum of proof required to sustain a conviction.

It has been noted that "facts disputable literally must not be made indisputable procedurally." Comment, "The Presently Expanding Concept of Judicial Notice," 13 V Ill. L. Rev. 528, 546

(1968). By giving appellant an opportunity to present evidence challenging the judicially noticed fact, we have made it possible for appellant to destroy the presumption, and thereby require that the fact be proven in the ordinary manner. When the presumption has been destroyed, this procedure carefully preserves the right of confrontation in the only situation where such right is meaningful.

Appellant's ex post facto argument is meritless. The constitutional provisions apply only to criminal laws enacted by legislative bodies. *Andrews v. Russell* (1845 Ind.), 7 Blackf. 474.

V

Appellant's final contention is that the trial court erred in failing to modify appellant's sentence on the basis that living in a house of ill fame is a lesser included offense of keeping such a house and that the penalties should correspond.

In order for an offense to be a lesser and included offense, it must be such that it is impossible to commit the greater offense without first having committed the lesser offense. *Certain v. State* (1973), — Ind. —, 300 N.E. 2d 345. Since the element of control inherent in *keeping* a house of ill fame could be exercised by some means other than *living* in a house of ill fame, we hold that *living* in a house of ill fame is not a lesser and included offense of *keeping* a house of ill fame. The trial court properly overruled appellant's motion.

For all the foregoing reasons, the judgment is affirmed.

Judgment affirmed.

Givan, C. J., and Arterburn, J., concur.

Prentice, J., concurs in result with opinion.

DeBruler, J., dissents with opinion.

In the Supreme Court of Indiana

Johnnie Marie Sumpter,
Appellant (Defendant Below),
v.
State of Indiana,
Appellee (Plaintiff Below).
No. 575 S 130

Appeal From the Vanderburgh Circuit Court
The Honorable William H. Miller, Judge

Prentice, J.—Concurring in Result

I concur in the result herein only because I regard the remand for the purpose of determining Appellant's sex to be erroneous. The result reached by the majority amounts to a correction of that error and an adoption of my dissenting opinion at 306 N.E. 2d 95 at 106 as the logical answer and the rule of this case.

In the Supreme Court of Indiana

Johnnie Marie Sumpter,
Appellant,
v.
State of Indiana,
Appellee.
No. 575 S 130

Appeal From Vanderburgh Circuit Court

DeBruler, J.—Dissenting

The procedure for establishing womanhood as a statutory element of the offense of which appellant stands convicted

served to deny appellant the right to trial by jury guaranteed by Art. 1, § 19, of the Indiana Constitution and is invalid as compelling a defendant to incriminate himself in violation of the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Art. 1, § 14, of the Indiana Constitution.

In this case, the judge, rather than the jury, determined that a statutory element of the offense was proved to have existed beyond a reasonable doubt. Why does this not deny the right to trial by jury? Appellant certainly had the right to trial by jury. That right is granted in Indiana by the Bill of Rights in Art. 1, § 19, which provides:

> "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."

In *Dedrick v. State* (1936), 210 Ind. 259, 2 N.E.2d 409, this Court held that a trial court denies the right to trial by jury if it mandates the jury to make an affirmative factual inference. In *Walter v. State* (1935), 208 Ind. 231, 195 N.E. 268, this Court stated:

> "It has been repeatedly held, and is well settled, that it is error for the court in a criminal action to instruct the jury what evidence will be sufficient to establish any ultimate fact. Such an instruction is an invasion of the constitutional right of the jury to determine the facts for itself." 208 Ind. at 239.

Here, the issue of whether appellant was a woman was taken entirely from the jury and decided by the court. If the case had been tried in a single proceeding before the jury, the jury would have been instructed that they were bound to consider that the womanhood of appellant had been proved beyond a reasonable doubt. In Indiana, under our Constitution, this procedure for determining sex by judicial notice is simply a denial

of the right to trial by jury. The most that a trial court can do, consistent with the right to trial by jury, is to point out that a particular inference would be reasonable. *Gann v. State* (1971), 256 Ind. 429, 269 N.E.2d 381; *Miller v. State* (1944) 223 Ind. 50, 58 N.E.2d 114.

While appellant has not specifically made the claim that the procedure is violative of the privilege against self-incrimination, it is appropriate to consider this issue in light of the closely related constitutional challenges which call the issue out.

The procedure for establishing sex works in this way. The judge announces that he takes judicial notice that the accused is either a man or woman. At this point, the judicially-noticed fact, standing alone without more, cannot serve to satisfy the due process burden of the State to prove the statutory element of sex beyond a reasonable doubt. At this point, the fact does not have sufficient evidentiary force or weight to support a conviction. However, this judicially-noticed fact can gain additional and sufficient evidentiary force or weight if the accused remains silent or fails to produce evidence sufficient to indicate that he is not of the sex alleged in the charge. It therefore becomes clear that the silence or inability to negate has the force of evidence and is used against the accused as affirmative evidence of that which the State must prove. Silence elevates the quality of the judicially-noticed fact to certainty beyond a reasonable doubt and increases the probability of conviction.

Silence of the accused in a criminal case cannot be used as evidence of guilt. *Griffin v. California* (1965), 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106; *Rowley v. State* (1972), 259 Ind. 209, 285 N.E.2d 646; *Keifer v. State* (1933), 204 Ind. 454, 184 N.E. 557. If the accused, under the procedure adopted here, does not attempt to produce evidence to rebut the judically-noticed fact, this silence serves as proof of that which the State is required to prove to convict.

If an accused testified in an attempt to produce sufficient evidence to rebut the judicially-noticed fact, that testimony is compelled and may be incriminating. Such testimony is compelled, because the accused knows that his silence will necessarily establish one of the elements of the offense against him beyond a reasonable doubt and also that, if he does not testify, the right to trial by jury on the issue will be lost. Such testimony may be incriminating, because, if it is insufficiently persuasive, it serves to raise the judicially-noticed fact to certainty beyond a reasonable doubt. Placing the burden of production upon the accused is in conflict with the privilege against self-incrimination, when the fact which the accused must produce some evidence about is a statutory element of the criminal charge and is therefore critical to the determination of guilt.

APPENDIX B

Opinion and Judgment of the Indiana Court of Appeals

(Filed May 21, 1973, Billie R. McCullough, Clerk of the Indiana Supreme Court and Court of Appeals)

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In the
Court of Appeals of Indiana,
First District

Johnnie Marie Sumpter,
Appellant (Defendant Below),
v.
State of Indiana,
Appellee (Plaintiff Below).
No. 1-872 A 54

Appeal from the Vanderburgh Circuit Court
The Honorable William H. Miller, Judge

Lybrook, J.

Sumpter was convicted by jury of living in a house of ill fame, pursuant to IC 1971, 35-30-1-1; Ind. Ann. Stat. § 10-4220 (Burns 1972 Supp.) which reads:

"Any female who frequents or lives in a house or houses of ill fame, knowing the same to be a house of ill fame, or who commits or offers to commit one [1] or more acts of sexual intercourse or sodomy for hire, shall be deemed guilty of prostitution, and on conviction thereof shall either be fined not less than one hundred dollars [$100] nor more than five hundred dollars [$500.00]; and imprisonment not to exceed 180 days or such person may be imprisoned in the Indiana women's prison not less than two [2] years nor more than five [5] years."

Sumpter's first contention is that the conviction was not supported by sufficient evidence because the State did not specifically prove beyond a reasonable doubt that the defendant was a female.

The evidence showed that on the date charged July 15, 1971, defendant was the owner of certain real property in the City of Evansville. The telephone and other utilities were in defendant's name. There were six bedrooms in the residence and defendant occupied the largest one which was on the first floor. There was evidence that defendant lived in the house and that the remaining bedrooms were used in the operation of a house of ill fame. Two former patrons testified that on the above date defendant had answered their knock at the door and admitted them. One of them had sexual relations in a basement bedroom with a person other than the defendant. When they departed, defendant let them out the door. The men testified that they had each patronized the house on about twenty prior occasions and had sexual relations with various prostitutes.

Sumpter argues that the State totally failed to prove that the defendant was a female person, as required by the above statute. We agree.

The statute begins, "Any *female* . . .", thus making proof that defendant was a female, an essential element.

The defendant did not take the stand and there was no testimony, lay or expert, as to defendant's sex.

The State argues that *Howard v. State* (1971), — Ind. —, 272 N.E. 2d 870, which also involved a conviction under Burns 10-4220, is dispositive of this issue.

The court in *Howard* observed:

"State's witness, Police Matron Carline Davenport, testified that after appellant was arrested that she had searched the appellant, partially disrobed. She further testified that in her capacity as police matron, she had seen the appellant in various stages of undress, and that *in her opinion the appellant was a female person. Such evidence, uncontradicted, is clearly sufficient to sustain the finding of the trial court.* We also note that the appellant's counsel as well as the prosecutor and each witness referred to the appellant as 'her' or 'she' indicating their belief that the appellant was a female person. Finally, the judge, as the trier of fact, had ample opportunity to observe the appellant throughout the trial. We believe the evidence more than ample to support the finding of the trial court that the appellant is a female person." [Our emphasis.]

In the case at bar there is no uncontradicted direct evidence of defendant's sex. However, as in *Howard*, there were numerous references to defendant as "she" or "her" and defendant was present in the court room throughout the trial.

The State maintains that *Howard* holds that anyone of the above categories of evidence is sufficient proof of sex.

A careful reading of *Howard* reveals that direct, lay-opinion evidence upon this subject is sufficient. *Howard* does *not* hold that either reference to a defendant by femiline pronoun or defendant's presence at the trial, is sufficient proof.

An analogous question arises in the proof of age required by the Armed Robbery Statute. In *Watson v. State* (1957), 236 Ind. 329, 140 N.E. 2d 109, the court found the age requirement (16 years) to be an essential element of the criminal offense, to be charged and proved. The court also held that where the defendant had not taken the stand and where there was no direct evidence concerning his age, the State had failed to prove the crime.

The court said:

> "The defendant did not testify or take the witness stand. May the jury observe the defendant as he sat in the court room and therefrom determine his age or conclude from the use of the term 'man' that he was more than sixteen years of age? *If the defendant had taken the witness stand* the jury would have been entitled to observe his demeanor and other characteristics while testifying. In observing the witness the jury undoubtedly could have arrived at some conclusion as to his age."

* * * * * * *

"One of the purposes of the trial is to confine evidence which a jury or court may consider to that which meets the legal test of being material, relevant, and otherwise competent. These rules have been developed through centuries of experience as the best method of excluding in so far as possible hearsay and other unreliable sources of information in an endeavor to seek the truth. To let the bars down and turn the jury loose to seek its own information where it cares to find it, would open a *Pandora's Box* of innumerable injustices in verdicts rendered.

A jury looking about the court room, seeking objects brought into the court room, has no right to consider such extrinsic material, and base their verdict thereon, or draw inferences therefrom, without such exhibits being properly

> referred to for their observation as evidence in the trial. The same rule holds true as to persons within the view of the jury during the trial." [Our emphasis.]

The State's argument that the jury could properly determine that defendant was female, simply because the defendant was in the court room during the trial, must fail because of the above holding of *Watson*.

Since there was no direct evidence of appellant's sex, we are left with the question whether the reference to the defendant by counsel and some of the witnesses, as "she", "her", and "Miss Luker" are sufficient proof of the defendant's sex.

We think not. As the court said in *Watson, supra*:

> "The proof of a crime should not be left to a game of guessing."

The State having failed to prove an essential element of the crime charged, this cause is reversed.

Robertson, P.J. and Lowdermilk, J., Concur.

APPENDIX C

Ruling of Indiana Court of Appeals on Petition for Rehearing

In the Court of Appeals of Indiana
First District

Johnnie Marie Sumpter,
Appellant (Defendant Below),

v.

State of Indiana,
Appellee (Plaintiff Below).

No. 1-872 A 54.

Appellee's Petition for Rehearing denied this 18th day of June, 1973.

GEORGE B. HOFFMAN, JR., C.J.

APPENDIX D

Prior Opinion and Judgment of the Indiana Supreme Court

(Filed January 22, 1974, Billie R. McCullough,
Clerk of the Indiana Supreme and Court of Appeals)

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In the
Supreme Court of Indiana

Johnnie Marie Sumpter,
Appellant (Defendant Below),

v.

State of Indiana,
Appellee (Plaintiff Below).

Supreme Court
No. 1273 S 261.
(Appellate Court
No. 1-872 A 54)

OPINION ON PETITION TO TRANSFER

Hunter, J.

The State of Indiana has petitioned this Court for transfer of the above cause. Defendant was convicted at trial for living

in a house of ill fame. IC 1971, 35-30-1-1; Ind. Ann. Stat. § 10-4220 (1972 Supp.). The Court of Appeals reversed, holding that the prosecution failed to prove that the defendant was a female—a required element of the crime charged. 236 N.E. 2d 131.

We believe the Court of Appeals correctly applied existing law when it reversed the trial court. However, we also believe that the existing law is in need of modification. Therefore, we have granted transfer. Several other issues presented to the Court of Appeals will also be considered herein.

1. It is axiomatic in the criminal law that the State must prove each and every element of the offense charged beyond a reasonable doubt. In the case at bar, the most fundamental element, i.e., that the accused be a female, was not affirmatively proved by the State. That is to say, the State failed to adduce any evidence specifically intended to establish the sex of the defendant. The record is replete with references by the State, the defense, and witnesses to the accused as "she" and "her." However, no testimony or documentary evidence appears on the record which definitively establishes the defendant's sex. The State, according to our existing law, failed in its burden of proving the accused's sex beyond a reasonable doubt.

The burden of proving the sex of the defendant is rightly upon the shoulders of the State. However, we believe the method and sequence of proof is in need of revision.

The sex of a human being is generally its most obvious characteristic. We can look at another human being and, with a very high degree of certainty, ascertain his or her sex. Therefore, why couldn't a presiding judge take judicial notice of a defendant's sex? We believe he can and should.

We prescribe the following procedure with the conviction that such is wholly consistent with practical reality and common sense.

When an individual is charged with an offense, an element of which is the sex of the accused, the trial court will take judicial notice of the defendant's sex. However, the judge's finding is not necessarily conclusive of the issue. Once the judge takes judicial notice of such fact, a rebuttable presumption arises in favor of the State. This is not to say that the burden of persuasion shifts from the State to the defendant. That burden never shifts. However, this procedure imposes a burden upon the defendant of producing evidence.

This Court has succinctly stated the legal significance and nature of a presumption:

> ". . . a presumption of law is not evidence nor should it be weighed by the factfinder as though it had evidentiary value. Rather, a presumption is a rule of law enabling the party in whose favor it operates to take his case to the jury without presenting evidence of the fact presumed. It serves as a challenge for proof and indicates the party from whom such proof must be forthcoming. When the opponent of the presumption has met the burden of production thus imposed, however, the office of the presumption has been performed; the presumption is of no further effect and drops from the case." *Young v. State* (1972), — Ind. —, 280 N.E. 2d 595, quoting *Commonwealth v. Vogel* (1970), 440 Pa. 1, 17, 268 A.2d 89, 102.

The above represents the procedure which we herein prescribe. In order to conserve precious judicial time, a rebuttable presumption of the defendant's sex arises once the judge takes judicial notice of such fact. This presumption is sufficient to constitute a *prima facie* case in favor of the State when the defendant fails to produce any competent evidence to the contrary. However, once the defendant challenges the presumption by introducing competent evidence, the presumption passes forever from the case. The State, then by affirmative evidence, must establish the defendant's sex beyond a reasonable doubt.

For this Court to reverse the judgment of the trial court and discharge the appellant on a technicality is to indulge in the kind of judicial antics which so exasperate the tax-paying public and promotes public dissatisfaction with the judicial system.

II. The petitioner contends that her motion to quash should have been sustained due to the fatally defective nature of the charging affidavit. Her specific allegations are that the statute under which the prosecution was brought is unconstitutional in that it punishes for a "status," and not for any overt criminal act or "crime"; that the statute is unconstitutionally vague; that the statute is violative of the Equal Protection Clause; that the statute is violative of the First Amendment. Furthermore, she argues that Count I (charging her with *living* in a house of ill fame) should be quashed because it is repugnant to Count II (charging her with *frequenting* the same place); that the affidavit did not specify the period of time of the alleged offense. The statute in question reads as follows:

> "*Prostitute.*—Any female who frequents or lives in a house or houses of ill fame, knowing the same to be a house of ill fame, or who commits or offers to commit one [1] or more acts of sexual intercourse or sodomy for hire, shall be deemed guilty of prostitution, and on conviction thereof shall either be fined not less than one hundred dollars [$100] nor more than five hundred dollars [$500]; and imprisonment not to exceed 180 days or such person may be imprisoned in the Indiana women's prison not less than two [2] years nor more than five [5] years. [Acts 1965, ch. 345, § 1, p. 1025; 1967, ch. 23, § 1, p. 28.]" IC 1971, 35-30-1-1; (Ind. Ann. Stat. § 10-4220 [1956 Repl.]).

Appellant argues that the statute imposes puunishment for a "status" rather than for overt criminal conduct. The fact of the matter is that the legislature has determined that living in a house of ill fame is a criminal offense. The legislature is empowered to proscribe conduct within the State of Indiana which

it deems to be criminal. (Art. 4, § 22, Indiana Constitution.) The case upon which appellant relies, *Robinson v. California* (1962), 370 U.S. 660, 8 L. Ed. 2d 758, can easily be distinguished from the case at bar. In *Robinson* a state statute which made drug *addiction* a criminal offense was held to be violative of the Eighth and Fourteenth Amendments (cruel and unusual punishment). As applied, the statute made criminal the status of drug addiction irrespective of non-use of drugs within the state. The court concluded, in essence, that no criminal act had occurred in the state. In this case, the Indiana statute in question proscribes criminal activity *within the state*. Unlike *Robinson*, there exists a nexus between the criminal act and the state.

Appellant further contends that the statute is unconstitutionally vague and, hence, offends the Due Process Clause of the Fourteenth Amendment. Penal statutes, in order to satisfy due process requirements, must be sufficiently explicit so as to adequately inform individuals of ordinary intelligence of the consequences of their contemplated conduct. *Bowie v. Columbia* (1964), 378 U.S. 347, 12 L. Ed. 2d 894. *Stanley v. State* (1969), 252 Ind. 37, 245 N.E. 2d 149. Appellant argues that the use of the term "house of ill fame" is too imprecise to adequately inform individuals that their conduct is proscribed by law. We categorically reject this assertion. We believe that an individual of ordinary intelligence fully knows and appreciates the meaning of "house of ill fame." Appellant speculates that perhaps a massage parlor or bookmaking operation could be considered a "house of ill fame." We believe they could be—but only if prostitution, as proscribed by the statute, were practiced therein.

Appellant urges us to declare the statute unconstitutional on grounds that its application to *women* and not to *men* violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause does not prevent a state from indulging in reasonable legislative classifications. *State ex rel.*

Miller v. McDonald (1973), — Ind. —, 297 N.E. 2d 826. In the usual case, establishing a rational basis for the classification will be sufficient to sustain its constitutionality. *Miller, supra.* There are instances in which the rational basis test will be inadequate and a higher standard of judicial scrutiny is required. This higher standard of scrutiny is only triggered when "suspect" classes or fundamental rights are involved. We know of no fundamental right to be a prostitute or to be free from prosecution for acts of prostitution. Nor, has a majority of the United States Supreme Court held that sex is a "suspect" class. Therefore, the prostitution statute will withstand constitutional muster upon a showing of reasonableness. That is to say, if "*any* state of facts rationally justifying it is demonstrated or perceived by the courts," the statute must stand. *United States v. Maryland Savings-Share Ins. Corp.* (1970), 400 U.S. 4, 27 L. Ed. 2d 4.

The Indiana legislature has made a policy decision that prostitution is a significant social problem only among females. Such a decision is clearly reasonable and therefore, should be sustained.

Appellant argues that the prostitution statute violates the federal and state constitutional prohibitions against establishment of religion and constitutional guarantees of religious liberty, by giving Judaeo-Christian ethics the force of criminal law. We find this contention to be utterly frivolus. Virtually all criminal laws are in one way or another the progeny of Judaeo-Christian ethics. We have no intention to overrule the Ten Commandments.

Appellant contends that Count I of the affidavit should have been quashed because it was inconsistent with, and repugnant to, Count II of the affidavit. Count I charged appellant with *living* in a house of ill fame, while Count II charged appellant with *frequenting* a house of ill fame. We concede that these

counts are clearly inconsistent with one another. However, we are unable to discern any prejudice visited upon the appellant as a result of that inconsistent pleading. In fact, appellant fails to direct us to *any* prejudicial effect whatsoever. The conviction was obtained only on Count II, and the record discloses an abundance of evidence to support that conviction. After the jury returned a guilty verdict on Count I, the state moved for and was granted a directed verdict of not guilty on Count II. A logical inconsistently in an indictment, which does not result in actual harm to the appellant, i.e., conviction on *both* counts, cannot rise to the status of reversible error.

Appellant alleges that the affidavit was defective in that neither count specifies the *period of time* in which she allegedly lived in or frequented the house of ill fame. Count I charged appellant with living in a house of ill fame on July 15, 1971. Appellant informs us that "the motion to quash correctly anticipated a problem which did, in fact, arise on trial." Appellant, at trial, objected to the introduction of evidence of her commission of the crime over a two-year period. Appellant takes the position that one is unable to prepare an adequate defense when the affidavit alleges the commission of an offense on one day and, at trial, evidence is admitted of criminal acts spanning a two-year period. This allegation is without merit for two reasons. First, there was substantial evidence adduced at trial that the appellant was in fact the resident proprietress of the house of ill fame on July 15, 1971. Secondly, there is a long-standing rule of evidence in Indiana which allows the admissibility of evidence showing the commission of a continuous offense at times prior to the time charged in the affidavit. *Townsend v. State* (1897), 147 Ind. 624, 47 N.E. 1. Obviously, residence in a house of ill fame is generally, by its very nature, a continuing phenomenon.

III. Appellant contends that her motion to dismiss should have been sustained on two grounds. First, she argues that a

prior affidavit charging prostitution was still pending when the present affidavit was filed. The affidavit upon which appellant was convicted was filed on September 30, 1971, the *same* day the prior charge was dismissed. Appellant takes the position that the prior charge was not officially dismissed until the judge signed the order book at the end of the day. Therefore, she argues, that the prior charge was pending when the present affidavit was filed. Upon facts similar to those in the case at bar, we have *presumed* that a prior indictment was dismissed before the new charges were filed. *Alstott v. State* (1933), 205 Ind. 92, 185 N.E. 896. In *Alstott*, an indictment was dismissed and an affidavit filed on the same day. *Alstott* is a much more extreme case than the case at bar in that the Court had to rely on the operation of a presumption. Here, we need not resort to such a presumption. The record clearly indicates that the dismissal of the prior affidavit *preceded* the filing of the present affidavit upon which appellant was convicted. To adopt appellant's ingenious logic is to honor form over substance. We hold, therefore, that for all intents and purposes, there was no charge pending when the present affidavit was filed.

Additionally, appellant claims that the State brought "successive vexatious prosecutions," resulting in a denial of due process. Applicant cites no authority for such a proposition other than cases involving *successive trials*. The appellant in this case was placed in jeopardy but one time. Double jeopardy clearly is inapplicable. Furthermore, it is important to note that the affidavit issued prior to the present affidavit was dismissed upon the motion of appellant.

IV. Appellant next alleges that her special plea should not have been overruled and denied, because the prostitution statute is unconstitutional and that the *jury* should have been permitted to consider and determine said plea. To begin with, we have held that the statute is constitutional. Therefore, the

trial court did not err in overruling the special plea, which attacked the statute's constitutionality. Furthermore, the constitutionality of a statute is not a matter for the jury. The only matter for the jury's consideration in this case was whether the appellant-defendant was guilty of prostitution.

V. Appellant contends that the trial court improperly admitted evidence with a tendency to prove *another* offense and hearsay evidence of reputation.

Evidence that the utilities and telephone in the house in question were in appellant's name was introduced over the appellant's objection. It is appellant's position that said evidence goes to proving a separate offense—namely keeping a house of ill fame—(see IC 1971, 35-1-83-2 (Ind. Ann. Stat. § 10-4217)), and that said evidence is highly prejudicial and inadmissible. As authority, appellant cites *Layton v. State* (1966), 248 Ind. 52, 221 N.E. 2d 881, for the proposition that one crime cannot be proved in order to establish another distinct crime. With this proposition we fully agree. However, the rule in *Layton v. State* contemplates a far different situation than in the case at bar. *Layton* is concerned with the admission of evidence of separate and distinct crimes—ones which must be established by independent evidence. In other words, both offenses stand on different evidentiary bases and require different proof. The principle enunciated in *Layton* is designed to combat the introduction of other offenses to prove the offense in question. ("He burglarized a house a week before; therefore, he must be guilty of burglary in this case.") In *this* case, evidence of the utilities in the appellant's name goes to prove *both*—keeping of and living in a house of ill fame. The mere fact that the evidence goes to prove an offense other than the one charged is immaterial, so long as that evidence has a *tendency* to prove or disprove the charged offense.

Appellant contends that the trial court erred in admitting evidence of the defendant's reputation and the reputation of the house in question. The appellant's position, with which we concur, is that the admission of such rank hearsay to prove that the house in question was *in fact* a house of ill fame, and that appellant was *in fact* a prostitute, violated appellant's right to confrontation as guaranteed by the Sixth Amendment to the United States Constitution and by Article 1, § 13 of the Indiana Constitution.

The right to confrontation has been held to be a two-pronged right. It contemplates both the right to cross-examine witnesses and the right to have the trier of fact assess the demeanor of those witnesses. *Barber v. Page* (1968), 390 U.S. 719. However, the right to confrontation, like most constitutional guarantees, is not *absolute*. In fact, there are a multitude of United States Supreme Court cases which have held that the major hearsay exceptions do not offend the Confrontation Clause. Established hearsay exceptions have become, in large measure, exceptions to the Confrontation Clause itself. McCormick states the relationship between the hearsay rule and the Confrontation Clause as follows:

> "The similarity to the underpinnings of the hearsay rule is evident. In the late 1700's when confrontation provisions were first included in American bills of rights, the general rule against hearsay had been accepted in England for a hundred years, but it was equally well established that hearsay under certain circumstances might be admitted. *A fair appraisal may be that the purpose of the American provisions was to guarantee the maintenance in criminal cases of the hard-won principle of the hearsay rule, without abandoning the accepted exceptions which had not been questioned as to fairness, but forbidden especially the practice of using depositions taken in the absence of the accused.* This last had been much complained of, and

> was later abandoned by the English judges and forbidden by statute. While the Clause, as it appears in the Sixth Amendment, in terms makes no provision for exceptions, in fact it has not so been construed. That departures may be allowable does not, of course, mean that they coincide completely with those of the hearsay rule, a conclusion that becomes more evident when the hearsay aspect is measured by State rules of evidence and the constitutional confrontation standard is federal. In fact the Supreme Court on more than one occasion has expressly rejected the idea that the hearsay rule and the right of confrontation are simply different ways of stating the same thing. *Nevertheless, instances in which an item of evidence admissible under traditional hearsay concepts has been held to violate the confrontation right are rare.* On the other hand, the clause has not stood as a solid barrier to liberalization of the admissibility of hearsay." *McCormick on Evidence*, § 252, pp. 606-607 (2nd ed.) (Our emphasis.)

In order for hearsay exceptions not to offend the Confrontation Clause of the United States and Indiana Constitutions, the hearsay evidence must possess a substantial "indicia of 'reliability' " (*California v. Green* (1910), 399 U.S. 149, 36 L. Ed. 2d 489).

Two old Indiana cases recognize reputation as an exception to the hearsay rule. *Betts, et al. v. State* (1883), 93 Ind. 375; *Schultz v. State* (1928), 200 Ind. 1, 161 N.E. 5. However, we do not believe such an exception can pass constitutional muster in light of the above discussion. We can conceive of no evidence more inherently suspect than reputation evidence based on the statements of out-of-court declarants. There simply is no "indicia of reliability"—in fact, if anything, there is an indicia of *unreliability*. There are no built-in safeguards as in the case of former, sworn testimony or admissions of a party-opponent. We, therefore, can see no jus-

tification for such an exception if we are to maintain the integrity of an accused's rights to confrontation. We do not hold that reputation evidence is in all instances inadmissible. Such evidence is admissible for impeachment purposes or when the character of a party is in issue. We only hold that evidence of reputation introduced as substantive evidence of guilt is inadmissible. In the case at bar the evidence of reputation was introduced to establish guilt and consequently was erroneously admitted by the trial court. However, such error does not constitute *reversible* error in this case. We are convinced that there was abundant independent evidence establishing the existence of a house of ill fame and the appellant's residence therein. The record discloses the following evidence most favorable to the State:

(1) On the day of her arrest, appellant owned the property upon which the house in question rests;

(2) The utilities were in her name.

(3) Appellant admitted that the belongings in a large first-floor bedroom were hers;

(4) There was direct testimony that the witnesses had had sexual relations in the house with prostitutes on numerous occasions, and on each one of these occasions, the appellant answered the door and let them in.

For all the foregoing reasons, the judgment of the trial court is hereby affirmed in part, and we also remand this cause to the trial court for determination of the defendant's sex pursuant to the procedures set out herein. The trial court should take any and all appropriate remedial action to correct the trial record, findings and judgment.

Arterburn, C.J., concurs.

Givan, J., concurs in the opinion but disagrees with the procedural remand.

Prentice, J., concurs in the granting of transfer and affirmance of the trial court's judgment only, with opinion.

DeBruler, J., dissents with opinion.

In the Supreme Court of Indiana

Johnnie Marie Sumpter,
Appellant,
v.
State of Indiana,
Appellee.
} No. 1273 S 261.

Appeal From the Vanderburgh Circuit Court
Honorable William H. Miller, Judge

Prentice, J.—Concurring in Part—Dissenting in Part

I concur in the opinion of the majority except insofar as it announces a concept of a rebuttable presumption arising from the trial judge taking judicial notice. This approach would leave the litigants in a quandary as to if and when such notice has been taken and as to where the "burden of producing evidence" lies. Assuming that sex is a legitimate basis for legislative classification with respect to the commercialization of sexual activity (a proposition which I accept only with considerable difficulty) in the absence of a special plea or the presentation of some evidence that the defendant's sex is other than that alleged in the affidavit or indictment, it is absurd,

to me, to require the State to offer evidence upon the issue. I liken it to the condition of sanity, without which there can be no intent to commit a crime requiring mens rea. Upon a charge of such a crime, the State is not required to prove the defendant's sanity, unless the defendant places the matter in issue. I would treat the matter of proof of sex in such cases in the same manner.

I would grant transfer and affirm the judgment of the trial court.

In the Supreme Court of Indiana

Johnnie Marie Sumpter,
Appellant,
v.
State of Indiana,
Appellee.
No. 1273 S 261.

On Petition to Transfer

DeBruler, J.—Dissenting

I find that I must dissent from the majority in this case since I cannot agree with its construction of a presumption in all crimes where an element of the offense is the sex of the defendant, and because I believe this statute violates both the Due Process and Equal Protection Clauses of the Constitution.

In its opinion the majority identifies the "most fundamental element" of this crime as the sex of the defendant and then pro-

ceeds to relieve the State from proof of this element by creating a judicial presumption. In criminal cases a court should be extremely reluctant to create a presumption which has the effect of carrying the State's case to the jury. The Legislature has included as one of the elements of the crime defined at I.C. 1971, 35-30-1-1, being Burns § 10-4220, that the defendant be a female. A presumption that in effect abrogates the State's responsibility to prove this element of the crime is contrary to one of the basic principles of our legal system; namely, that the State be required to prove every element of a crime as defined by the Legislature.

Moreover there is no overriding necessity to create a presumption of femininity here. It is a simple matter for the State to carry its burden of providing the sex of the defendant by introducing affirmative evidence on the point in the same manner in which other elements of the crime are established. In *Howard v. State* (1971), — Ind. —, 272 N.E.2d 870, this Court accepted as sufficient the direct testimony of a non-expert lay witness as to her opinion of the defendant's sex when that was an element of the crime charged. It is highly unlikely that the State should have any more difficulty today identifying the sex of a person than it did at the time of the *Howard* decision. The accused has been observed and arrested by police officers, transported around, often subjected to search of quarters and person, taken to jail and subjected to an inventory of personal belongings and required to don prison garb. It is inevitable that some official in these channels (and therefore readily available as a witness to the State at trial) will have made sufficient observation of the accused to render admissible his or her opinion as to the sex of the accused. Evidence of sex which would be sufficient to warrant a finding of guilt beyond a reasonable doubt is therefore readily, cheaply and obviously available to the State. I cannot conceive of any legitmaite reasons why we should treat this particular element of the crime differ-

ently than any of the other legislatively specified elements required to be established in the record by affirmative evidence.

I also agree with appellant that this statute, which punishes a female for living or frequenting a house of ill fame, violates the due process clause. It is a fundamental element of due process that criminal statutes enacted by the Legislature must clearly define the behavior to be prohibited[1] and cannot be so broadly defined as to include citizens who are not engaging in activities inimicable to the health, safety, morals or welfare of the State. *Lanzetta v. New Jersey* (1938), 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888; *Kirtley v. State* (1949), 227 Ind. 175, 84 N.E. 2d 712. While the Legislature may be assumed to have the power to regulate commercialized sexual conduct it cannot do so in a manner which is overly broad or ill defined. That part of the statute with which we are concerned here subjects a defendant to a five year prison term for nothing more than residing in a certain building. No act other than the status of living in a certain location is required. Moreover, our Legislature has enacted numerous laws which prohibit specific acts of commercialized sexual conduct and which encompass perhaps every conceivable act which may be deemed within the purview of the problem. The remainder of Burns § 10-4220, punishes the acts of committing or offering to commit acts of sexual intercourse or sodomy for hire. In addition this State has statutes which make it a crime to operate or manage a house of prostitution (I.C. 1971, 35-1-83-2, being Burns § 10-4217), to induce a female to become a prostitute (I.C. 1971, 35-1-87-1, being Burns § 10-42-18), or to share the earnings of a postitute (I.C. 1971, 35-30-6-1, being Burns § 10-4226). There is no need for the State to make the status of living in a house of ill fame a crime when it has readily available these alternative and more precise laws which are designed to punish specific acts.

[1] The problem of vagueness in the term "house of ill fame" is emphasized by the majority's treatment of this issue. In response to appellant's contention that "house of ill fame" is imprecise and may include such places as massage parlors or bookmaking operations the majority states that these places may be within the meaning of the phrase, "but only if prostitution, as described by the statute, were practiced therein", thus clearly implying that the term "house of ill fame" is restricted to places where prostitution takes place. However in the case of *State v. Griffin* (1948), 226 Ind. 279, 79 N.E.2d 537, this Court specifically held that the term "house of ill fame" includes not only houses of prostitution but additionally bawdy houses and gaming houses.

The United States Supreme Court in a unanimous opinion in the case of *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110, considered a city ordinance which declared one who, among other pursuits, habitually spent his time "frequenting houses of ill fame" to be a vagrant and subjected him to ninety days in jail. The court found that such an ordinance was vague, overbroad and made activities criminal which were not harmful to society in themselves. I believe that portion of Burns § 10-4220 under consideration here is analogous to the ordinance found in *Papachristou*.

Lastly, I believe the majority's treatment of appellant's equal protection claim is also erroneous. In its opinion the majority upholds this statute's limitation of criminality only to females who frequent houses of ill fame by conjecturing that the Legislature must have made a policy decision, "that prostitution is a significant social problem only among females". Actually a companion statute found at I.C. 1971, 35-1-87-2, being Burns § 10-4219, makes it a crime for a male person to frequent or visit a house of ill fame. Obviously the majority's assumption that the Legislature has decided this behavior is only of significant social importance when committed by females is erroneous since the same behavior is made criminal in another statute when undertaken by males.

In my view, however, this does not end the problem raised by the statutes in terms of the equal protection clause since Burns

§ 10-4219 subjects a male who frequents a house of ill fame to a misdemeanor sentence of sixty days in jail, while Burns § 10-4220 punishes the same crime when committed by a female as a felony with a prison sentence of two to five years.

I agree with the majority that the United States Supreme Court has not as yet found that legislation which creates classes purely on the status of sex to be suspect and hence subject to strict judicial scrutiny. *Reed v. Reed* (1971), 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225.[2] This does not mean, however, that classifications of a non-suspect nature are not required to meet any standard of reasonableness at all. In finding that a State statute which gave preference in administering estates to male survivors over female survivors was unconstitutional the court again reiterated that:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike.' " 404 U.S. at 76.

These statutes clearly provide dissimilar treatment for men and women similarly situated. Surely subjecting one class of citizens to a punishment over thirty times as harsh as another class committing the same crime simply on the basis of the defendant's sex cannot withstand even the slightest gaze by the Equal Protection Clause. This is the very kind of arbitrary, unreasonable and capricious legislation forbidden by the Constitution.

In *Morgan v. State* (1913), 179 Ind. 300, 101 N.E. 6, this Court found a statute which provided that male were auto-

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[2] However, in *Frontiero v. Richardson* (1973), 93 S.Ct. 1764, four justices found that classifications based on sex were impliedly held to be suspect by the decision in *Reed v. Reed* (1971), 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225.

matically committed to an institution for the criminally insane when they were found not guilty of a violent crime by reason of insanity, while females similarly acquitted were afforded a commitment hearing, to be a classification repugnant to the Equal Protection Clause. I believe that Morgan is *stare decisis* in this State for the proposition that differentiation in the disposition or sentencing of those found in need of commitment or incarceration cannot be made purely on the basis of sex. See also *Commonwealth v. Daniel* (1968), 430 Pa. 642, 253 A.2d 400; *Lamb v. Brown*, 456 F.2d 18 (10th Cir., 1972); *U.S. ex rel. Robinson v. York*, 281 F.Supp. 8 (D.Conn., 1968). For these reasons I respectfully dissent from the opinion of the majority.

APPENDIX E

Ruling of Indiana Supreme Court on Petition for Rehearing of Prior Opinion and Judgment

In the Supreme Court of Indiana

Johnnie Marie Sumpter,
Appellant (Defendant Below),

v.

State of Indiana,
Appellee (Plaintiff Below).

No. 1273 S 261

Appellant's Petition for Rehearing dismissed pursuant to Rule A.P. 11 (B) (8) this 25th day of April, 1974.

DONALD H. HUNTER, Acting C.J.

APPENDIX F

Order of the Supreme Court of the United States Dismissing Appeal

Supreme Court of the United States

No. 73-1907

Johnnie Marie Sumpter,
Appellant,

v.

Indiana.

Appeal from the Supreme Court of the State of Indiana.

This Cause having been submitted on the statement of jurisdiction and motion to dismiss or affirm,

On Consideration Whereof, it is ordered by this Court that the appeal herein be, and it is hereby, dismissed for want of jurisdiction.

October 15, 1974

APPENDIX G

Order of the Court of Appeals of Indiana Transferring Appeal

In the Court of Appeals of Indiana, First District

Johnnie Marie Sumpter,
Defendant-Appellant,
v.
State of Indiana,
Plaintiff-Appellee.
No. 1-1074-A-146

Order

Comes now Joe W. Lowdermilk, Associate Judge of the Court of Appeals of Indiana, First District, and would respectfully show and report that the above-captioned case was appealed to this Court and reversed.

That transfer was accepted by the Supreme Court of Indiana and the cause remanded to the trial court for further proceedings; that as evidenced by the briefs in the within cause now before this Court on appeal, the trial court did conduct such further proceedings and entered a new judgment thereon and from which the present appeal emanates.

That inasmuch as the Supreme Court of Indiana had jurisdiction in the first appeal, and their orders were carried out by the trial court, the matters now presented are within the knowledge and under the review of the Supreme Court of Indiana.

That it is the opinion of the undersigned that any work done on this appeal by this Court would be a waste of time as the case will, in all probability, be transferred to the Supreme Court

of Indiana for further and final review; that the matters contained in this case are of such great import they should be passed on by the Supreme Court.

Wherefore, this cause is now ordered, pursuant to consent of the Supreme Court of Indiana, to be transferred to the Supreme Court of Indiana for its full and final determination.

Ordered, this 22nd day of May, 1975.

JONATHON J. ROBERTSON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1307

JOHNNIE MARIE SUMPTER,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of Indiana to which Mrs. Sumpter's Petition for Writ of Certiorari pertains has now been reported unofficially at 340 N.E. 2d 764.

QUESTIONS PRESENTED

The questions presented by Mrs. Sumpter will be used herein for purposes of structuring this Brief. Objections to certain of the questions will be noted in the appropriate

section of argument. Those questions presented by Mrs. Sumpter are as follows:

1. Is a defendant in a criminal case entitled to trial by jury?
2. Is the double jeopardy standard violated by granting the state another chance to prove a factual element it failed to prove in a first trial?
3. Can a greater punishment be imposed for a lesser offense?
4. Can a greater punishment be imposed upon women, than men, for essentially the same offense?
5. In a criminal case, can the burden of proof ever be constitutionally shifted to the defendant?
6. Does a retrospective application of a new criminal procedure, to a defendant's detriment, offend the *ex post facto* principle?

ARGUMENT

1.

JURY TRIAL WAS NOT REQUIRED

The Petition for Writ of Certiorari attempts to present the issue as one of the right to jury trial generally in situations where factual determinations are to be made. Such an issue is not presented in this case. The Supreme Court of Indiana specifically rejected the concept that the determination of a person's sex, when a relevant issue, was not subject to trial by jury. Pet. p. A-5. Rather, the issue to be considered here is whether there was any factual dispute presented which could be determined by a trier of fact, whether judge or jury. Both the trial court and the Supreme Court of Indiana determined that no such issue was presented.

The procedure provided for in Indiana for determination of sex is that the person's appearance allows the trier of fact to take judicial notice of the person's sex, which notice acts as a rebuttable presumption. Such presumption is sufficient basis for a finding of fact so long as there is no competent rebuttal evidence. If that presumption is actually challenged, then it completely vanishes and is of no evidentiary value. It is improper to inform a jury of such a presumption. Whether the presumption has been rebutted is a question of law. *Sumpter v. State,* 306 N.E.2d 95 (Ind., 1974); *Young v. State,* 258 Ind. 246 (1972). It does not appear that Mrs. Sumpter has at any time in this long and involved litigation presented any claim that she is not of the female sex; the only challenge has been

to the general validity of judicial notice in certain hypothetical situations.

The case is thus similar to the situation presented in *United States ex rel, Heirens v. Pate,* 405 F.2d 449 (7 Cir. 1968) cert. den. 396 U.S. 853 (1969) which case upheld the refusal of a trial judge to have a competency hearing tried by jury "[s]ince no evidence raised a bonafide doubt as to petitioner's competence . . ." 405 F.2d at 451. No substantial federal constitutional issue as to the right to jury trial has been presented.

II.

THE DOUBLE JEOPARDY STANDARD WAS NOT VIOLATED

The argument portion of the Petition for Writ of Certiorari dealing with the double jeopardy provisions of the Fifth and Fourteenth Amendment seems to admit that this Court has consistently ruled that double jeopardy does not occur when a defendant is retried after he successfully appeals an initial conviction, even if that appeal was based upon an insufficiency in the evidence. See Petition, pp. A-3 and A-4, and cases there cited. The proposed distinction is that those cases involved "reversals" of convictions whereas the Supreme Court of Indiana in the first appeal of this case remanded without using the word "reversal." No reason is stated for giving any weight to that distinction, which would appear to be a distinction without a difference.

III.

THE STATUTORY PUNISHMENT IS PROPER

The third issue presented in the Petition for Writ of Certiorari is whether the penalty assessed in this case

constitutes cruel and unusual punishment in that it is more severe than the punishment provided for the offense of keeping a house of ill fame. It might first be noted that the only case cited by Mrs. Sumpter, *Weems v. United States,* 217 U.S. 349 (1910), rests on such an extreme factual base as to be of doubtful precedential value in this matter.

More importantly, though, the assumption that keeping a house of ill fame is "grosser misconduct" (Pet. p. 13) than prostitution is not supported by Indiana law. Those statutes are set forth at pp. 3-4 of the Petition. The statute on keeping a house of ill fame, Indiana Code 35-1-83-2, both on its face and as construed by Indiana courts in the case of *Senst v. State,* 319 N.E. 2d 663 (Ind. App. 1974), involves only the passive action of allowing a house over which one has a right of control to be so used. Thus, the prostitution statute under which Mrs. Sumpter was convicted can reasonably be considered the greater offense.

IV.

NO ISSUE OF SEX DISCRIMINATION IS PRESENT IN THIS CASE

The issue of sex discrimination under the Indiana prostitution statute as it existed at the time of the offense charged in this case is not before the Court at this time. The issue was not considered by the Supreme Court of Indiana in the present appeal. That issue was presented to this Court in the prior appeal, No. 73-1907, and the Motion To Dismiss or Affirm filed therein considered the issues. Those arguments will not be repeated here.

V.

NO BURDEN OF PROOF WAS PLACED UPON DEFENDANT

The procedure adopted in Indiana for determination of the sex of a person allows a rebuttable presumption based upon judicial notice occasioned by the person's appearance. That presumption is adequate to support a finding of the person's sex unless competent evidence to the contrary is presented, at which time the presumption has no further effect or evidentiary weight. Mrs. Sumpter attempts to describe that procedure as placing a burden of proof upon a defendant, which would be contrary to this court's ruling in *Mullaney v. Wilbur,* 419 U.S. 823 (1975).

That argument fails to distinguish between a burden of proof and a burden of presenting evidence. That distinction is noted at fn. 31 of the *Mullaney* opinion, which allows for a shift in the burden of going forward with evidence through the use of a presumption under certain cases. The required strength of the logical connection of the fact presumed to the basis of the presumption, as set forth in *Barnes v. United States,* 412 U.S. 837 at 845-846 (1973), would appear to be amply met in this case.

VI.

THE OPINION OF THE SUPREME COURT OF INDIANA WAS NOT AN EX POST FACTO LAW

It will be assumed here that Mrs. Sumpter is intending to raise a due process issue relating to the retroactive application of a newly annouced doctrine created by a court, since the *ex post facto* doctrine applies only to legislative enactments. *United States v. Wasserman,* 504 F.2d 1012 (5 Cir 1974). This case, however, does not involve a retroactive application in the usual sense of that term,

since the rule was announced in the very case to which the *ex post facto* claim is made. Were *ex post facto* standards applied there, then many decisions of this Court are also unconstitutional, e.g., *Harris v. New York,* 401 U.S. 222 (1971); *Kirby v. Illinois,* 406 U.S. 682 (1972).

In any event, this case would not run afoul of an *ex post facto* analysis since it involves only a procedural question of the manner of proof unlikely to have any substantial effect on the outcome of the case. Such changes have never been considered improper. *Beazell v. Ohio,* 269 U.S. 167 (1925); *James v. Twomey,* 466 F.2d 718 (7 Cir, 1972).

It might further be noted that there was in fact no change in the law unfavorable to Mrs. Sumpter. Despite the comment of the Supreme Court of Indiana on the first appeal at p. A-22 of the Petition, previous Indiana law allowed proof of sex on a lesser standard of proof. *Howard v. State,* 257 Ind. 166 (1971).

CONCLUSION

For the foregoing reasons, the State of Indiana urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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